In the Supreme Court of the United States

JUN 29 1974
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1973

No. 73-954

STANDARD OIL COMPANY OF CALIFORNIA;
CHEVRON ASPHALT COMPANY; SHELL OIL COMPANY;
UNION OIL COMPANY; ARIZONA REFINING CO.;
EDGINGTON OIL COMPANY; SAHUARO OIL COMPANY;
DOUGLAS OIL CO. OF CALIFORNIA;
ATLANTIC RICHFIELD COMPANY; RICHFIELD OIL CORPORATION;
GULF OIL CORP.; WILSHIRE OIL CO. OF CALIFORNIA;
INDUSTRIAL ASPHALT, INC.; and
AMERICAN PETROFINA, INCORPORATED,

Petitioners,

vs.

STATES OF ALASKA, ARIZONA, CALIFORNIA, OREGON,
WASHINGTON, et al.,

Respondents.

Reply to Brief in Opposition of the States of Alaska and Washington and Brief in Opposition of the State of Arizona

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Brief in Opposition of the States of Alaska and Washington

The States of Alaska and Washington* oppose certiorari on the grounds, first, that the decision of the court below can be harmonized with the decision of this Court in the *Hanover* case** (Br., p. 6) and, second, that the decision of the court below does not conflict with the decision of the Third Circuit in *Mangano*† (Br. p. 15). Neither ground has merit.

1. On the first point the argument of respondents is: It is true that when a manufacturer or supplier is sued by the first purchaser he must pay treble the amount of the overcharge, because *Hanover* precludes the defendant from asserting as a defense that the first purchaser passed on the overcharge to a subsequent purchaser. However, in so holding, *Hanover* does not hold that the subsequent purchaser is precluded from asserting that the overcharge was passed on to him, and he may, therefore, sue the same defendant and recover again. In other words, to use the language of respondents, *Hanover* bars a *defendant* from asserting "defensive pass-on" but permits a *plaintiff* to assert "offensive pass-on."

The argument is untenable. As we pointed out in our petition (p. 13) the problem with respect to proving a pass-on is identical regardless whether a plaintiff or defendant is the one asserting the pass-on. This Court in *Hanover* expressly rejected the contention "that sound laws of economics require recognizing" that an overcharge to a first purchaser was passed on to a subsequent buyer or consumer (392 U.S. 492-493):

> "Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a busi-

*The States of California and Oregon have concurred in the brief of the States of Alaska and Washington.

***Hanover Shoe v. United Shoe Mach.* (1968) 392 U.S. 481.

†*Mangano v. American Radiator & Standard San. Corp.* (3 Cir. 1971) 438 F.2d 1187.

> nessman [the first purchaser] may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price."

Respondents would read *Hanover* as holding that the problems of proving pass-on are "insurmountable" when a defendant offers to prove it, but that the "insuperable" difficulties of proof evaporate if a plaintiff offers to prove identically the same fact. The inescapable consequence of such a double standard would be to permit recovery for the same overcharge (trebled) as many times as there are levels in the distributive chain. This, of course, cannot be squared with this Court's holding that, in the absence of a cost-plus contract or its equivalent, the *cause of action* under the Clayton Act *for the full amount of the alleged illegal overcharge* is in the first purchaser:

> "Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; * * *" (392 U.S. 494).

The many decisions cited at pages 7 and 8 of our petition concur in the analysis of Judge Lord in the *Philadelphia Housing* cases:

> "As has been indicated previously, that reasoning [of the Court in *Hanover*] explicitly correlates rejection of the passing-on argument of defendants against one buyer with rejection of liability of those defendants to more remote purchasers * * *" (50 F.R.D. p. 30).*

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*Respondents cite four pre-*Hanover* decisions which held that indirect purchasers could recover damages for violations of the Sherman Act (Br., pp. 7-9). Each of these cases was cited to this Court by United Shoe Machinery in its brief in the *Hanover* case (Brief for Petitioner, No. 463, October Term, 1967, p. 66):

> "Thus, for example, several courts have held that a State or municipality may sue a manufacturer of construction materials used in a

2. *The Third Circuit Decision in Mangano.* In our petition for a writ of certiorari we pointed out that the decision of the court below is in conflict with the decision of the Third Circuit in *Mangano v. American Radiator & Standard San. Corp.* (3 Cir. 1971) 438 F.2d 1187. Respondents seek to distinguish *Mangano* on the ground that it involved a dismissal for failure to answer interrogatories (Br. 15-16) and quote the following from the court's opinion:

> "We will affirm the dismissals on the basis of the district court's thorough and well-reasoned opinion of April 6, 1970, upon which all three orders are predicated. In the circumstances of these cases, it was within the district court's sound discretion to dismiss the actions of the present appellants solely for inexcusable failure to answer interrogatories" (438 F.2d 1188).

Respondents fail to quote what immediately follows in the opinion of the court:

> "Although such a conclusion is sufficient to dispose of these appeals, we recognize that a decision on the substan-

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public project for treble damages for overcharges which were passed on to the plaintiff by the general contractor who bought from the manufacturer. *Armco Steel Corp. v. North Dakota* 376 F.2d 206 (CA 8 1967); *Washington v. American Pipe & Constr. Co.* 1967 Trade Cas. ¶ 72,233 (WD Wash. Sept. 14, 1967); *Missouri v. Stupp Bros. Bridge & Iron Co.* 248 F. Supp. 169 (WD Mo. 1965), certificate to appeal denied 249 F. Supp. 111 (WD Mo. 1966); *Washington v. General Elec. Co.* 246 F. Supp. 960 (WD Wash. 1965). Thus United should in justice be allowed the opportunity to show that Hanover sustained no injury from the lease-only policy even if that policy were illegal, because any excess cost of leasing over purchasing was not borne by Hanover."

This rationale was rejected by this Court in *Hanover* in resolving the conflict of decisions then existing in the lower courts.

Respondents also argue the false issue that *Hanover* does not require "privity of contract" between plaintiff and defendant (Br., p. 11). The touchstone of recovery established by *Hanover* is not "privity," but whether there is an independent pricing decision which cuts the chain of causation between the first and second purchaser. The district court in this case, applying *Hanover,* reserved to respondents the right to recover "where the indirect purchases of liquid asphalt were made upon pre-existing cost-plus contracts" (Appx. to Pet., p. 23).

tive issues presented to us by the alternative holding may have value. The plumbing fixtures litigation is 'the most massive multidistrict litigation * * * being processed under Section 1407,' * * * Present consideration of the alternative ground of decision may facilitate the conclusion of this litigation. Therefore, we have considered and affirm the district court's decision as based upon substantive law involved in the homeowners', commercial building owners', and apartment building owners' cases. More particularly, absent a showing by the plaintiffs that their purchases were made 'pursuant to a preexisting cost-plus contract or analogous fixed markup type of arrangement,' * * * it is appropriate, in light of Hanover Shoe, Inc. v. United Shoe Machinery Corp., 1968, 392 U.S. 481, * * * to dismiss these three cases."

Brief in Opposition of the State of Arizona

Arizona argues that this Court should postpone consideration of the issue until it has "matured" in further decisions of other courts of appeals (Br. pp. 3-4). For many reasons this argument is particularly inappropriate in this case. In the first place, the resolution of the issue depends upon the interpretation of a leading decision by this Court, a decision which was made for the very purpose of resolving a conflict which is now recreated by the decision below. In the second place, the Ninth Circuit's decision not only conflicts with the Third Circuit, but is also contrary to many decisions of district courts throughout the country. The issue may arise in virtually every price-fixing case. Postponing uncertainty can only impose a heavy and unwarranted burden upon the lower Federal courts which are handling these burdensome cases, by endless testimony relating to pass-on if the Ninth Circuit is followed.

In the court below, the Attorneys General of 29 states filed briefs *amicus curiae* stressing that the issue is of "extreme concern" to the states in pursuing treble damage actions. In addition,

the United States filed a brief *amicus curiae* in which, among other things, it stated:

> "This case presents an important question regarding the right of so-called 'indirect purchasers' to sue for damages caused by violations of the antitrust laws. Resolution of this question will directly affect the proprietary interests of the United States and will have a significant impact on enforcement of the antitrust laws by private parties."

We respectfully submit that the question involved warrants the exercise of this Court's discretionary jurisdiction and that the interests of justice would not be served by a postponement of an authoritative ruling.

CONCLUSION

For the foregoing reasons, and for those stated in our petition, we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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